ROMAN-DUTCH LAW

Among the numerous systems of law administered in the British Empire not the least important is the survival known as Roman-Dutch law (*Roomsch Hollandsch Recht*). It is for historical reasons the law of the South African colonies, Ceylon and British Guiana, though its integrity has been largely Anglicised, especially in Natal, by the abolition of *lex hoc edictali, legitima portio,* and many other characteristic features of the older law. Classical Roman law is, of course, the basis, modified by Teutonic custom, canon law, and ordinances or *placaaten*. For instance: The Roman law of intestate succession, as developed by Justinian, agreed only partially with the two local systems of the *Aasdomsrecht* and the *Schependomsrecht*. Of ordinances, the most notable were those of 1540, 1570 and 1580, the two latter attempted codes of criminal and civil procedure respectively.

The Netherlands themselves abandoned Roman-Dutch law when in the last century they placed themselves under the code of the usual Continental type. The consequence is that one must go back to a comparatively remote period for the majority of the text-writers and cite as authorities books no longer authoritative among the Dutch themselves. There is probably no other system in which the text-books are as antiquated and in which such rusty weapons come to the hand of the practitioner.

Of these books, the works of Johannes Voet (1647-1713) take the first place. His *Commentarius ad Pandectas* is the principal authority. He is the Papinian, the Coke, the Story, the Savigny of the system. Other authorities of high rank—some better known in wider fields of law—are Grotius (1583-1645), *Inleiding tot de Hollandsche Rechtsgeleerdheid;* Vinnius (1588-1657); Groenwegen (1613-1652), *De Legibus Abojatis;* van Leeuwen (1625-1682), *Censura Forensis;* Bynkershoek (1673-1743); *Quaestiones Juris Privati;* van der Keesel (1738-1819), and van der Linden (1756-1835). The works of these distinguished jurists might well be compared with those of the *prudentes,* such as Papinian and Ulpian, in the Golden Age of Roman law. Many of them have been translated into English, in whole or in part.

As has been said, there is a tendency to assimilate Roman-Dutch law to English law, especially in commercial matters.

Thus Wessels, one of the latest writers on the subject, says: "South African usages are often built up on the commercial practice prevalent in England, and in this way the English commercial law is gradually improving the Roman-Dutch law by adapting it to modern customs. In many branches of law this tendency is very obvious, such as partnership and agency. In other matters the influence is more subtle, but at the same time very real." So strong is the tendency that some look forward to a time when Roman-Dutch law will be assimilated altogether by the superior vitality of the English system. But as it is, there are still differences of unusual interest to the student of comparative jurisprudence, especially—as may be supposed—in the greater use of the Latin language in Roman-Dutch proceedings. Some of the main differences are these—contract being the most important and so put first:

CONTRACT. There is a difference of opinion as to consideration. The *causa* or *redelijke oorzaak* which must be the basis of a contract is adopted from Roman law. Is it the same as the English consideration? The Cape and Natal say "yes;" the Transvaal and Ceylon say "no." In Guiana, the question seems unsettled. In all cases part payment is *causa* for release of a debt, though it is otherwise in England.[1] The old *jus retractus* or *naasting,* as to which so much appears in Voet, is not now in force in any colony. Under this right, which allowed relations within certain limits to upset a contract for the sale of real estate by tendering the price paid, it is difficult to see how any title could be secure. The same difficulty arises with the Roman *laesio enormis* as a ground of rescisson, extended in its application by Roman-Dutch law. The doctrine was abolished by statute in Cape Colony in 1879, but appears to exist in the other colonies. In England, it is the duty of the creditor to seek the debtor when payment is due; in Roman-Dutch law the reverse is the case. In England where payment on account of several debts is made at the same time the creditor may appropriate as he pleases, even to a debt barred by the *Statute of Limitations.* The *imputatio* in Roman-Dutch law must have been of such debt as, if the creditor were debtor, he would have wished discharged. Where neither party makes any *imputatio,* English law presumes in favor of discharge of the earlier in time; Roman-Dutch of the more

[1] *Foakes v. Beer,* 9 App. Cas., 605.

burdensome. A contract made by an insane person is void,[2] not voidable as in England. This decision also affirms, contrary to English law, the legal right of a *negotiorum gestor* to remuneration when he acts for the lunatic's benefit. An infant may ratify a contract on coming of age which he cannot do in England by the Infants' Relief Act, 1874. Sale does not pass the property, as in England, but the cumbrous Roman rule is followed, under which the contract passes *vacua possessio* with an implied covenant for restitution on eviction. Earnest (*rouwkoop*), may be paid on a sale of immovables. The law of suretyship presents important differences. The Roman *beneficia ordinis* and *divisionis* are in full force. A woman cannot become surety unless she renounce the benefit of the *Sc. Velleianum* and the *si qua mulier.*[3] In England, a principal debtor is discharged by "giving time." This is no discharge in Roman-Dutch law. In England, a gift once delivered is irrevocable; in Roman-Dutch law it may be revoked on several grounds, one being the gross ingratitude of the donee. The liability of partners is joint in English, joint and several in Roman-Dutch law. The mode and effects of assignment differ in the two systems. Roman-Dutch law allows assignment without notice and assignment by way of security, not necessarily absolute. In some colonies the rule of the *Lex Anastasiana* seems still in force, viz.: that the purchaser of a debt must not exact more from the debtor than the price at which the debt was purchased.

Real Estate. The feudal incidents do not apply in Roman-Dutch law, the tenure being allodial. The grounds entitling a tenant to complete or partial remission of rent are much more liberal than in England, *e. g.*, destruction of the premises, invasion by the enemy, unusual unproductiveness. For an interesting case see *Fleming v. Johnston,* [1903] Transvaal Rep., 319, where a farm could not be effectively cultivated owing to the Boer War. Equitable mortgage is unknown. All mortgages must be registered. The *facit hypothec* over things *invecta et illata* takes the place of the English distress. Roman-Dutch law, like English, has always protected the mortgagor. The *parate executie,* or proviso for sale on default, was held invalid at an early date. As to prescription, which corresponds to the Eng-

[2] *Molyneux v. Natal Land Co.,* (1905) App. Cas. 555.

[3] See a recent case of *Bank of Africa v. Cohen,* (1909) 2 Ch., 1.

lish limitation, the period does not agree with anything in England, it being a third of a century, thirty-three and one-third years (*bij phet verloop van het derden deel van hondert jaren*), except in Cape Colony, where it has been shortened by statute to thirty years.

SUCCESSION. Notarial and holograph wills are unknown in England, and mutual wills, though not unknown in England, are of more importance in South Africa. They generally take the form of a joint document executed by husband and wife, appointing the survivor heir of the spouse dying first. Much of the law will be found in *Denyssn v. Mostert,* L. R. 4, P. C. 236. There is no right or custom of primogeniture in Roman-Dutch law. An illegitimate child may succeed to his mother's estate *pari passu* with legitimate children. (*Een wijf maaktgeen bastaard.*) Roman law comes home to us in the list of persons disqualified to take under a will. Among them are exiles, convicts, such as have caused the death of the testator or negligently failed to discover those who caused his death, those between whom and the testator *inimicitia* arose subsequently to the will, widows marrying within the *annus luctus,* the writer of the will, notary or otherwise.

MARRIAGE makes a minor of age and does not revoke a will. In the absence of a settlement marriage creates between the spouses a community of goods (*gemeenschaf von goederen*). Adultery or desertion by the husband is sufficient ground for divorce without the necessity of some additional matrimonial offense, as in England. The guilty parties may not intermarry. *Legitimatio per subsequens matrimonium* is allowed, a mode reprobated in England by the barons at the Parliament of Merton in 1236. Community may be continued even after the death of one of the spouses. This *boedelhouding,* as it is called, must be distinguished from the similar word in the older law, *boedelafstand* or insolvency.

DELICTS AND CRIMES. Roman-Dutch law knows nothing of the English refinements in seduction and slander. The seduced woman can bring her own action and all slander is actionable without special damage. By a recent decision of the Privy Council, it was held that the principle of *Rylands v. Fletcher,* L. R. 3, H. L. 330, making a person legally liable for the non-natural user of his property, is not inconsistent with Roman-Dutch law.[4]

[4] *Eastern Telegraph Co. v. Capetown Tramways Co.,* (1902) App. Cas., 381.

Criminal law has by legislation for the most part been brought into accordance with that of England. At one time an accused person might have applied for a writ of purgation, citing all persons interested, but this seems to be obsolete.

PROCEDURE. The *namptissement* (security) is a feature of the Roman-Dutch system. By it payment of the whole or part of a claim may be ordered by the court *pendente lite,* the plaintiff giving security to repay it if he be unsuccessful in the action. A decree of perpetual silence (*preventie en cas van purge*), may be pronounced against one who asserts in public that he has a cause of action against another. He must bring his action within a certain time or submit to a decree. Compare in England the suit for jactition of marriage and the proceedings under Section 36 of the *Patents and Designs Act,* October, 1907, for obtaining an injunction in case of groundless threats of legal proceedings. Arrest of a *peregrinus* or *nitwonende vreemdeling* in order to found jurisdiction—the Roman-Dutch maxim is *Arrest fundeert jurisdictie*—is a survival of an age when the Low Countries were the creditors of Europe. The arrest may be either of person or of property, but is considerably mitigated in modern practice. Compare the practice of foreign attachment at one time in use in the City of London, but declared to be invalid by a judgment of the House of Lords. *Mandament* was an interesting link between the Roman interdict and the modern injunction. It was intended to protect possession and was of three kinds: *van maintenue, van complainte,* and *van spolie,* all resting on the canonist maxium, *Spoliatus ante omnia restituendus est.* They have mostly been superseded by more modern remedies, especially the Writ of Spoliation.

The best modern authorities are the judgments of Sir Henry de Villiers, late Chief Justice of the Cape, the greatest modern master of Roman-Dutch law, and certain text-books, almost all from South Africa. Among these the writer has derived most advantage from G. T. Morice, *English and Roman-Dutch Law,* (Grahamstown, 1905) and J. W. Wessel's, *History of the Roman-Dutch Law* (Grahamstown, 1908). Other modern handbooks of value are: Kersteman, *Law Dictionary;* Juta, *Leading Cases;* Nathan, *The Common Law of South Africa;* Van Zijl, *Judicial Practice of South Africa,* and Berwick, *Translation and Commentary on Voet, De Contrahenda Emptione.* In the *Law Quarterly,* Vol. XX, 41, will be found a brief sketch of some of

the differences between English and Roman-Dutch law, but very incomplete.

The reports are voluminous. They are fullest in South Africa and would bear favorable comparison with those of the United Kingdom and the United States. Among them may be named those of Menzies, Searle, Roscoe, Buchanan and Kotze, as well as the Natal, Ceylon and Guiana Reports and the reports of the Judicial Committee of the Privy Council on appeal from the colonies.

It may be stated in conclusion that London University and the Inns of Court have lately provided for the teaching of and examination in Roman-Dutch law, and that Oxford is at present considering a scheme for admitting it as a special subject in the examination for the B.C.L. degree.

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